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IN THE

Supreme Court of the United States

October Term, 1958.
No. 169

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.
and
BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. .....

GROCERY DRIVERS UNION LOCAL 848, etc., *et al.*,

Appellants,

vs.

SEVEN UP BOTTLING COMPANY OF LOS ANGELES, INCORPORATED,

Appellee.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees hereby move to dismiss the appeal from the judgment of the Supreme Court of the State of California on the following grounds:

(1) That this Court lacks jurisdiction of this case because the state court judgment is not final; it is not complete; and, it is not "ripe" for a decision;

(2) That the appeal is not timely insofar as raising the constitutionality of the state Jurisdictional Strikes Statutes by reason of the fact that the judgment of the California Supreme Court upholding the validity of those statutes was rendered in 1953 after

an appeal from the judgment of dismissal of such action based solely on the question of the validity of those statutes;

(3) That there is no substantial Federal question involved or presented; and,

(4) That the state court judgment rests on adequate and independent state grounds.

The appellants herein have chosen to appeal even though the proper manner of presenting this case to the Court is by petitioning for certiorari. Had the latter method been used, appellants would have been forced to disclose facts and issues which we are now compelled to expose herein and which facts and issues would have resulted in a refusal by this Court to grant certiorari. Thus, we are compelled to prepare and to present this Motion to Dismiss on the foregoing grounds which are dispositive of this case.

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By CARL M. GOULD,
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BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Restatement of This Case.

A. Question Presented.

The only question involved in this case is whether or not a state court has the power to remedy by *damages* conduct which constitutes a tort under state law when there has been no showing that interstate commerce is involved or affected and despite the fact that the problem involves activities by a labor union.

B. Proceedings in the Trial Court.

The findings of fact and conclusions of law [Clk. Tr. pp. 37-40] demonstrates that the trial court found that the appellants had engaged in concerted interference with the appellee's business, arising out of a controversy between two unions, one of whom with which appellee had a valid and bona fide collective bargaining contract and which union was not dominated by the appellee, as to which should have exclusive collective bargaining rights for appellee's employees.

Such findings and conclusions were based in part on evidence dating back to 1942 when the Independent Union filed a complaint in the Superior Court of the County of Los Angeles against appellants [Pltf. Ex. 31]. The court found there that appellants did, by *threats of force and violence,* engage in acts to coerce members of Independent Union to become members of appellants; that there were voiced threats of physical injury made by appellant Pitts at appellee's plant, and that there was an excessive number of pickets trailing trucks operated by members of Independent Union, and rude and boisterous conduct on the part of appellants herein.

The court also found there that these activities were for the purpose of coercing appellee's employees into abandoning their own independent union and into joining appellants and appointing appellants as their bargaining agent [Pltf. Ex. 31 (Findings)].

Independent Union and its members told their customers that they belonged to their own union and had a contract with appellee; that they wanted no part of appellants [Rep. Tr. pp. 1340, 1343].

Appellants assaulted an employee of appellee [Rep. Tr. p. 3354] and engaged in mass picketing [Rep. Tr. p. 3360] and unruly conduct [Rep. Tr. p. 3360]. Appellants offered inducements to employees to leave employment with respondent [Rep. Tr. pp. 3358, 3359] and engaged in harassing, trailing and intimidating employees of respondent [Rep. Tr. p. 3363].

Appellants admit that they commenced a campaign to organize appellee's employees [Rep. Tr. p. 132] and for that purpose picketed, boycotted and called a strike [Rep. Tr. p. 143].

Appellants knew that appellee's employees had their own union organization [Rep. Tr. p. 147].

Such concerted interference constitutes a tort under the California State Jurisdictional Strikes Act and the trial court determined that such conduct violated that Act.

Although the California Supreme Court stated that "truck drivers of suppliers, and some customers refused to cross the picket lines to make deliveries or respectively to make purchases" and such statement is adopted by appellants in their Jurisdictional Statement on page 4 under the heading, Statement of the Case, the trial court actually did not make such a finding; there was no evi-

dence introduced to support such a finding, and the only place it appeared in the record was in the allegations of appellee's complaint.

Furthermore, appellants on page 20 of their Jurisdictional Statement assert that "The State Supreme Court found that the Union engaged in peaceable picketing at retail outlets which carried the Company's product and that some customers and delivery personnel refused to make purchases and deliveries respectively. While the State Supreme Court might have stated that, the trial court in fact did not make such a finding.

Finally, the rationale of the trial court in deciding this case and in rejecting the appellant Union's offer of proof to show that the appellee's business affected interstate commerce was based not on the theory that it had "concurrent jurisdiction" with the National Labor Relations Board, as the California State Supreme Court misleadingly stated and appellants herein adopted on page 6 of their Jurisdictional Statement, but instead was that the activity complained of was neither protected nor prohibited by the Taft-Hartley Act, thereby making the issue of interstate commerce moot, and that such activity was a violation of California's Jurisdictional Strikes Act.

C. This Case Is Distinguishable From and Should Not Be Considered With the Garmon Decision.

First, of all, there is a difference in the basic facts involved in the two cases. Garmon involved an employer whose employees were unorganized by a Union, whereas this Seven Up case involves an employer whose employees have been organized by a Union since 1940.

Also, in *Garmon*, the facts showed that the employer came under the jurisdiction of the National Labor Rela-

tions Board and that the union was engaged in Federal unfair labor practices as defined in the Taft-Hartley Act, neither of which is true here.

Furthermore, in Seven Up—

(1) There have been collective bargaining contracts in effect between the Seven Up Company and a labor organization for more than eighteen years;

(2) The appellant unions sought to compel by coercive conduct and economic violence a breach of that existing contract and a substitution of themselves as representative of the employees;

(3) It is presently undecided as to whether or not the employer's operations affect interstate commerce; thus far the state court has *not* made such a determination; and,

(4) No final judgment except as to money damages has been entered in this Seven Up case.

Whereas, in the *Garmon* decision—

(1) No union represented the employees of the employer involved;

(2) No collective bargaining contract ever existed between the employer and any other labor organization;

(3) The unions in that case were engaged in organizational activities;

(4) The trial court found that interstate commerce was affected and the court determined that the employer was covered by the Federal Taft-Hartley Act; however, the National Labor Relations Board refused to exercise its statutory jurisdiction; and,

(5) This United States Supreme Court held that the Board had jurisdiction and that the state court was without power to grant *injunctive* relief (not damages) by applying the Federal statute.

Thus there is no "labor dispute" involved, in its traditional sense and meaning, in the Seven Up case where a Union has represented the employees of appellee for more than 18 years.

Moreover, the basis of the holdings in the two cases differ: in *Garmon*, the basis is the public policy of Labor Code Section 923 as judicially implemented and declared by the California Supreme Court in its own *Garmon* decision; whereas in this Seven Up case, the basis of the holding is the public policy of the State as expressed in the Jurisdictional Strike Statutes.

Significantly, the California Supreme Court, though referring in the Seven Up case to the *Garmon* decision, did not say that that decision actually controlled the Seven Up case.

For all of the above reasons, this Court should consider this case alone and independently of the *Garmon* decision.

ARGUMENT.

I.

This Appeal Is Not Timely Because the Statute of Limitations Has Run on Whatever Rights Appellants Might Have Had to Appeal.

Appellants are attempting to raise herein the constitutionality of California's Jurisdictional Strikes Act of 1947, despite the fact that the constitutional validity thereof was determined by the California Supreme Court in the first *Seven Up* case decided five years ago. (*Seven Up etc. Co. v. Grocery, etc. Union,* 40 Cal. 2d 368.)

That decision was made on appeal from a judgment of dismissal, based on the merit, by the trial court.

Since the appeal was from the judgment, as distinguished from a temporary injunction as in *Montgomery v. Ledbetter,* 344 U. S. 178, *supra,* appellants' only recourse of further testing the validity of such statute was by way of appeal at that time to this United States Supreme Court.

Having failed to appeal at that time, appellant cannot now, five years later, attempt to raise that same question in this same Seven Up case for the statute of limitations on their doing so has long since expired. (Rules 10 and 11, Supreme Court Rules.)

II.

This United States Supreme Court Is Without Jurisdiction to Review This Case Because the State Court Decree Is Not Final.

It is fundamental that in order for this Supreme Court of the United States to have jurisdiction to review a state court judgment, such judgment must be "final" within the meaning of 28 U. S. C. Sec. 1257.

> *Montgomery v. Ledbetter*, 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196.

> And ". . . for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.'"

> *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 91 L. Ed. 1662, 1665.

> Moreover, "To be appealable the judgment must be not only final, but complete. (Citation of cases.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter. . . ."

> *Collins v. Miller*, 252 U. S. 364, 371, 64 L. Ed. 616, 619, 40 S. Ct. 37.

The possibility that matters left open by a state court's judgment may generate additional constitutional questions militates against its finality.

> *Republic Natural Gas Co. v. Oklahoma* (1948), 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

And state court judgments may ordinarily be reviewed only upon an order or judgment disposing of the whole case and adjudicating all rights.

Republic Natural Gas Co. v. Oklahoma, supra.

The holding of the court below was to reverse the judgment of the trial court insofar as it awarded injunctive relief and to affirm that court's judgment insofar as it awarded damages. The trial court was also instructed to permit the defendants to amend their answer and to allege and then to prove additional facts, if they are able to do so, that the plaintiff is engaged in interstate commerce.

The application of the above principles to the holding of the California Supreme Court shows that such Court's judgment is not "final" as is required for this Court to have jurisdiction of it on review:

(1) The litigation has not ended so that the trial court has only ministerial acts to perform. To the contrary, the trial court must now allow an amendment to the defendants' answer, allow the introduction of additional evidence, and then make a determination as to whether injunctive relief shall be granted.

(2) For the same reasons, the judgment is not "complete" or "final" as to the "whole subject matter"; the only determination made is that the plaintiff is entitled to damages.

(3) Whether interstate commerce is or is not affected, *which has yet to be determined*, might well generate

"constitutional questions"; thus far, none actually have arisen under the facts presented.

(4) The judgment clearly does not "dispose of the whole case" nor "adjudicate all rights."

As this Supreme Court has previously so aptly stated:

> "Only one branch of the case has been finally disposed of below. Therefore none of it is ripe for review by this Court."
>
> *Collins v. Miller, supra,* 64 L. Ed 616, 619,

quoted with dispositive approval in

> *Republic Natural Gas Co. v. Oklahoma, supra,* 92 L. Ed. 1212, 1222.

And:

> "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. (Citation.) The policy against premature constitutional adjudication demands that any doubts in maintaining this burden be resolved against jurisdiction."
>
> *Republic Natural Gas v. Oklahoma, supra,* 92 L. Ed. 1212, 1222.

Therefore, since the judgment is not "final" within the meaning of 28 U. S. C. Sec. 1257, this Supreme Court is without jurisdiction and the appeal should be dismissed.

III.

This Supreme Court Is Without Jurisdiction to Review This Case Because There Is No Substantial Federal Question Presented or Involved.

A. There Is No Showing That a Federal Question Was in Fact Decided or Involved, Nor Is There Even a Showing That Interstate Commerce Is Affected.

The rule is that it is essential in order for this Supreme Court to have jurisdiction to review a state court decision on "federal question" grounds, that it be clearly shown that the state court actually decided a Federal question.

> *Black v. Cutter Laboratories* (1956), 351 U. S. 292, 100 L. Ed. 1188, 76 S. Ct. 824;
>
> *Durley v. Mayo* (1956), 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

A mere discussion of Federal questions in the opinion of a state court is insufficient to give this Supreme Court jurisdiction to review, for in the words of this Court, "This Court, however, reviews judgments, not statements in opinions. (Citation of cases)."

> *Black v. Cutter Laboratories, supra*, 100 L. Ed. 1188, 1196.

And where, from a ruling of a state court, it is uncertain whether that court did or did not pass upon a Federal constitutional question, the Supreme Court will construe the state court's decision as not having passed upon the constitutional question.

> *Armstrong v. Armstrong* (1956), 350 U. S. 568, 100 L. Ed. 705, 76 S. Ct. 629.

In applying these principles to the instant case, it must be remembered that the holding of the court below was to affirm the trial court's judgment for damages and to reverse its judgment insofar as it awarded injunctive relief.

In its decision, the California Supreme Court states that on the present state of the record, it appears desirable to permit the defendants to amend their Answer to allege and prove, if they are able to do so, that the plaintiff is engaged in interstate commerce. Thus, there has been no showing thus far that interstate commerce is affected; nor has it been determined that the Federal laws are applicable; and, therefore, no Federal question has been decided.

The effect of the reversal as to injunctive relief makes this clear. In California, the effect of such a reversal is to vacate the judgment as to the permanent injunction and to leave the case "at large" for further proceedings, as if it had never been tried on the injunction issue, and as if no permanent injunction had ever been rendered. (See generally, *Central Savings Bank v. Lake* (1927), 201 Cal. 438, 443.) The preliminary injunction, of course, remains in effect until a final determination of the case on its merits as to the issue of equitable relief.

The unqualified reversal of the judgment with reference to the injunction, without direction to the trial court is effective to remand the case for new trial on the issue of whether an injunction should be granted, and places the parties in the same position as if the case had never been tried on the application for the injunction. (*Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428, 91 L. Ed. 1662.)

In *Hall v. Superior Court in and for Los Angeles County*, 45 Cal. 2d 377, the California Supreme Court held that an unqualified reversal remands the cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable, even if there has been only a partial reversal of judgment.

Where a preliminary injunction was granted, as here, and a judgment in favor of plaintiff was reversed, and a new trial granted, it was held that the granting of a new trial did not entitle the defendant to a dissolution or modification of the injunction. (*Hess v. Winder*, 34 Cal. 270.)

Thus, in the instant case, in accordance with the decision of the California Supreme Court, on the remand to the trial court, the issue would be tried as to whether respondent is engaged in commerce and is covered by the Labor-Management Relations Act of 1947. If the trial court finds that it is, then by direction of this Court, the preliminary injunction would be dissolved and judgment would be entered against respondent on this issue. If on the other hand, the trial court finds and concludes that respondent is in *intra*state commerce as it contends, then judgment would issue granting respondent a permanent injunction.

In any event, the important fact remains that there has been no showing thus far that interstate commerce is affected and accordingly no Federal question has been decided nor has one yet been involved.

B. Recent Decisions of the United States Supreme Court Are Decisive of This Case for They Show That State Courts Retain Their Jurisdiction to Remedy Tortious Activities by Damages Even Though the Field Involved Is Labor Relations and Even Though the N. L. R. B. Might Grant Partial Relief.

In a series of recent decisions this United States Supreme Court has made it clear that if the activity complained of is of the type over which state courts traditionally have jurisdiction (that is, breaches of contracts and torts), then even though such activity also constitutes an unfair labor practice, state courts have jurisdiction of the subject matter.

On May 26, 1958, this United States Supreme Court decided *International Association of Machinists v. Gonzales,* 26 L. W. 4355, which involved a *breach of contract* action, and *International Union U. A. W., et al., v. Russell,* 26 L. W. 4347, involving a *tort* action, and as recently as June 2, 1958 it denied certiorari in *International Brotherhood of Teamsters, Local 174 v. Selles* (U. S. S. C. October 1957 Term, Case No. 649 [*Selles v. Local 174, etc.,* 314 P. 2d 456]), thereby affirming the Washington state court judgment for money damages won by a truck driver in a *tort* action against a union.

In the *Gonzales* case, Gonzales, who was wrongfully expelled from the union of which he was a member, sued that union for reinstatement and damages. As stated by the United States Supreme Court, the question concerned the extent to which the Labor Management Relations Act "excluded the exercise of state powers." The majority opinion stated that:

> ". . . there may be embedded circumstances that could constitute an unfair labor practice under §8(b)(2) of the Act."

and the dissent emphasized that:

> ". . . the uncontested facts disclose the probability of a §8(b)(2) unfair labor practice, the existence of—[which]—must for pre-emption purposes be assumed."

In deciding that the state court did have jurisdiction of the controversy, the majority stated that:

> "As *Garner v. Teamsters Union*, 346 U. S. 485, could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. But the other half of what was pronounced in *Garner—that the Act 'leaves much to the states.'—is no less important.* See 346 U. S. 25 488. The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating eludication. (See *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474-477. (Emphasis added.)
>
> * * * * * * * *
>
> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages."
>
> * * * * * * * *
>
> "And the possibility of *partial relief* from the Board *does not*, in such a case as is presented, *deprive a party of available state remedies for all damages suffered.* See *International Union, United Automobile Workers v. Russell*, 26 L. W. 4347.
>
> "If as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced

simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote." (Emphasis added.)

In the *Russell* case, Russell sued the union for damages for malicious interference with his lawful occupation.

In this case, too, as in the *Gonzales* case, the question as stated by the Court was:

"The principal issue of law is whether the state court had jurisdiction to entertain Russell's amended complaint or whether that jurisdiction had been preempted by Congress and vested exclusively in the National Labor Relations Board."

In deciding the case this Court *assumed* that the activity complained of constituted an unfair labor practice over which the Board would have had jurisdiction, the same assumption which was made in the *Laburnum* case, but in spite of such assumption this Court decided that the state court *did have* jurisdiction of the controversy.

It stated that:

". . . the Supreme Court of Alabama reversed the trial court and upheld the jurisdiction of that court, *even though the amended complaint charged a violation of §8(b)(1)(A)* of the Federal Act. (Emphasis added.)

* * * * * * * *

"This case is similar to *Laburnum* in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct

which was a tort and *also assumed* to be an *unfair labor practice*. (Emphasis added.)

* * * * * * * *

"Petitioners assert that the possibility of *partial* relief distinguishes the instant case from *Laburnum*. It is our view that *Congress* had not made such a distinction and that it *has not*, in *either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered.*" (Emphasis added.)

The significance of these two cases is far-reaching. They demonstrate the principle that in actions either for *breach of contract* or for *tort*, state courts retain jurisdiction to remedy the wrongful conduct even though such activity constitutes an unfair labor practice over which the National Labor Relations Board normally would have jurisdiction and *even though the Board might grant partial relief to the wronged party for the conduct committed.*

In addition, in the *International Brotherhood of Teamsters, etc. v. Vogt, Inc.* (June, 1957), 77 S. Ct. 1166, this Supreme Court pointed out that a state can declare its own public policy, by its legislature or by its courts, both in the criminal and the civil field, and that there is a broad field in which the states can then enforce that policy by remedying tortious activities violating the effectuation of that policy.

In the first *Seven Up* case decided in 1953 (*Seven Up etc. Co. v. Grocery etc. Union*, 40 Cal. 2d 368), the California Supreme Court held as valid state law and state public policy the state's Jurisdictional Strikes Act of 1947, as against a constitutional attack. No appeal was taken from this judgment and it is now final.

As already pointed out, this United States Supreme Court in the *Russell* and *Gonzales* cases, *supra*, has recognized that state courts do have jurisdiction to grant *damages* for conduct which under state law is tortious in nature.

Since the activity complained of herein was held to be violative of California's valid public policy, the California courts have the power to remedy by damages a violation of such state policy.

C. The Conduct Engaged in by the Appellants in This Case Is Not Prohibited nor Protected by the Labor Management Relations Act, and Even if the Activities in Question Did [Contrary to the Facts] Substantially Affect Commerce, the Jurisdictional Strikes Act Is Within California Jurisdiction.

If the activity in question has not been prohibited by the Federal Labor Management Relations Act, and has not been protected by that Act, the States are free to regulate.

The activity in question here is not an *unfair labor practice* within the Federal Act, and is not otherwise prohibited by that act, *in view of the fact that no labor organization has been certified after a representation election.* In such a situation, *absent certification* of either union, the activity is *not an unfair labor practice* under Section 8.

Labor Mgmt. Rel. Act of 1947, Sec. 8(b)(4)(c); *Bennaz, etc. v. N. L. R. B.* (1956), 230 F. 2d 47;

N. L. R. B. Gen. Counsel Adm. Ruling, Case No. 1113 (Jan. 23, 1955), 35 Labor Relations Reference Manual 1533;

Address by General Counsel, N. L. R. B. (May 13, 1954), 34 *Labor Relations Reference Manual* 78, 79.

Congress, *in Section 8* of the National Labor Relations Act, expressly defines certain unfair labor practices engaged in by labor organizations for certain defined unlawful objects.

Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice, LISTED IN SECTION 8 affecting commerce.

There are certain unfair practices engaged in by labor organizations which are NOT listed in Section 8 and NOT defined in the Federal Statute. The Statute does not cover, and Congress did NOT intend to cover, all unfair labor practices.

The activity here in question has *not been* PROTECTED by the Federal Act. *Where two unions are competing* for recognition as exclusive bargaining representative, *concerted activity by one of them to compel the employer to recognize it prior to certification by the National Labor Relations Board is not an activity protected by the Act,* since it would compel the employer to recognize and deal with a union that has not been selected voluntarily by the employees.

Hoover v. N. L. R. B. (1951), 191 F. 2d 380;

Ohio Ferro-Alloys Corp. v. N. L. R. B. (1954), 213 F. 2d 646;

N. L. R. B. v. Electronics Equipment Co., Inc. (1952), 194 F. 2d 650, and at 205 F. 2d 296 (1953).

Hoover v. N. L. R. B. (6th Cir., 1951), 191 F. 2d 380, involved

> "A boycott instituted by a union . . . during the pendency of proceedings for an election ordered

by the Board, to force the employer to recognize it as the bargaining agent of the employees in preference to a competing labor organization. . . ."

The Court said that if the employer, pending the election recognized one of the unions, it would be interfering with the Board's election procedures and would have been guilty of an unfair labor practice as well, violating Section 8(a)(1)—interference with and restraining its employees in the exercise of their right of self-organization through a representative of their own choosing. Thus, to recognize the union would be to do an illegal act. Then the Court said:

> "The Act does not confer absolute right upon employees to engage in every kind of strike or other concerted activity; and *the fact that certain concerted activity is explicitly protected by statute, does not mean that improper concerted activity is also protected.* For it is not necessary that such improper activities be explicitly excepted from the protection of the statute. The rights set forth in the Act are not to be considered as excluding the right to commit or participate in unfair labor practices or unlawful concerted activities; and *the courts have firmly established the rule that under the provisions of Section 7 of the Act, employees are not given any right to engage in unlawful or other improper conduct. International Union, etc. v. W. E. R. B.*, 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651." (Italics added.)

The *Hoover* case was followed in *Ohio Ferro-Alloys Corp. v. N. L. R. B.* (6th Cir., 1954), 213 F. 2d 646.

In *N. L. R. B. v. Electronics Equipment Co., Inc.* (2nd Cir., 1952), 194 F. 2d 650, during the pendency of an election between two competing unions, the employer fired

most members of one union. The fired employees circulated a letter requesting that employer's goods be boycotted. In deciding whether employees' activity was protected, the Court noted the *Hoover* doctrine:

> "As we read the court's decision in Hoover, and the Board's pre-Hoover rulings on which the court relied, *union activities in this kind of case are unprotected only if the union is in fact campaigning to compel unlawful conduct by the employer.*"

The Court remanded the case to N. L. R. B. to determine if the letters showed that the employees intended in fact to pursue the aim of an exclusive bargaining agreement.

In the subsequent hearing, 205 F. 2d 296 (1953), after the hearing officer had found that the intent was as expressed above, *the Court, per curiam with one dissent, denied enforcement of N. L. R. B.'s order of reinstatement.*

The *dissent pointed out,* correctly,

> *"But in denying enforcement, my brethren necessarily hold that action taken to obtain a security contract after consent to an election contest with a rival union, but before certification, is as a matter of law not protected activity under 29 U. S. C. §157."*

In the instant case, Appellants engaged in concerted interference with the business of respondent in the form of economic violence, and economic pressure, involving picketing, boycotting, unfair listing and other concerted activities engaged in the context of a jurisdictional strike to force respondent to recognize and sign a collective bargaining contract with appellant unions when appellants had not been selected by respondent's employees as their representative. Another labor organization had been almost unani-

mously selected by respondent's employees and had been properly recognized by respondent as collective bargaining representative as respondent was required to do by reason of its obligation to recognize a union which is the majority choice of its employees.

Collective bargaining relationship by way of a written contract has been in effect between respondent and one union for more than eighteen (18) years. Under all applicable laws, a certification election is not necessary, and there is a statutory and common law duty on an employer to recognize and deal with a union selected by employees.

The cases hereinbefore cited hold that it would be unlawful for respondent to recognize and deal with appellants and their concerted activities for such a purpose is not protected activity. Further, such activity engaged in by appellants is not an unfair labor practice in violation of the National Labor Relations Act, in view of the fact that neither of the competing unions had prior thereto been certified after a representation election. (L. M. R. A., Sec. 8(b)(4)(c).) Since no representation election had been held by the National Labor Relations Board, neither of the competing unions had been certified and thus the concerted activity did not violate Section 8(b)(4)(c) and the Act does not apply.

Since the activity complained of is neither *prohibited* nor *protected* by the Federal Act, regardless of whether interstate commerce is or is not affected, the California Courts certainly have jurisdiction to apply the Jurisdictional Strikes Act by awarding damages.

IV.

In Any Event, This Court Is Without Jurisdiction to Review This Case Because the State Court Judgment, Assuming Its Ruling Embodied a Federal Question (Contrary to Fact) Is Nevertheless Supported on Adequate State Grounds Apart From That Federal Question.

It is a settled principle of law that there can be no Supreme Court review of a state court's judgment, although such judgment embodies a ruling on a Federal question, if that judgment is supported on adequate state grounds independent of the Federal question.

Black v. Cutters Laboratories (1956), *supra*, 351 U. S. 292, 100 L. Ed. 1188, 76 S. Ct. 824;

Durley v. Mayo (1956), *supra*, 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

Furthermore, this Supreme Court has said that it will not proceed with review of a state court judgment until the fact that the judgment does not rest on adequate and independent grounds of state law appears in the record.

Herb v. Pitcairn (1945), 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

In the instant case, it should be apparent that aside from all other consideration, the fact that there is no showing that interstate commerce is involved or affected should alone be sufficient to demonstrate that the decision of the state court awarding damages necessarily had to be based on state law grounds.

Conclusion.

Upon each and every ground stated in the Motion to Dismiss and for each and every one of the reasons stated herein, appellee submits that this Supreme Court should dismiss the instant appeal.

Respectfully submitted,

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